UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
DAISYTEK, INCORPORATED,	§	Case No. 03-34762 HDH-11
ARLINGTON INDUSTRIES, INC.	§	Case No. 03-34765 HDH-11
B.A. PARGH COMPANY,	§	Case No. 03-34766 HDH-11
DIGITAL STORAGE, INC.	§	Case No. 03-34767 HDH-11
DAISYTEK LATIN AMERICA, INC.	§	Case No. 03-34768 HDH-11
TAPEBARGAINS.COM, INC.	§	Case No. 03-34769 HDH-11
TAPE COMPANY	§	Case No. 03-34770 HDH-11
VIRTUAL DEMAND, INC.	§	Case No. 03-34771 HDH-11
DAISYTEK INTERNATIONAL CORPORATION	§	Case No. 03-35724 HDH-11
	§	
	§	Jointly Administered Under
Debtors	§	Case No. 03-34762 HDH-11
OFFICIAL UNSECURED CREDITORS COMMITTEE AND DAISYTEK, INCORPORATED, ET AL.	§	
	§	
Plaintiffs	§	
vs.	§	Adversary No. 03-3754
	§	
BANK OF AMERICA, N.A., As Agent And Lender, J.P. MORGAN CHASE BANK, BANK ONE, N.A., THE CITIGROUP/BUSINESS CREDIT, INC., COMERICA BANK, SIEMENS FINANCIAL SERVICES, INC., UPS CAPITAL CORPORATION, FLEET CAPITAL CORPORATION, FOOTHILL CAPITAL CORPORATION, and PNC BANK, NATIONAL ASSOCIATION	§	
	§	
Defendants	§	

MEMORANDUM OPINION AND ORDER
ON BANK GROUP'S MOTION TO DISMISS

On September 30, 2003, the Official Unsecured Creditors Committee (the "Committee") of the above debtors in this jointly-administered bankruptcy case (the"Debtors") initiated this adversary proceeding by filing a complaint (the "Complaint") against the above defendants (the "Bank Group"). The Committee purported to bring the adversary proceeding "in the name of the Estates and in its own capacity." (*See*, Compl., Introductory Paragraph at 2). The Complaint asserts causes of action against the Bank Group for fraud (Count One), negligent misrepresentation (Count Two), duress (Count Three), breach of duty of good faith (Count Four), breach of contract (Count Five), promissory estoppel (Count Six), equitable subordination (Count Seven), breach of fiduciary duty (Count Eight), and preferences (Count Nine). (Compl. at 7-13.) On or about October 16, 2003, the Bank Group filed a Motion to Dismiss pursuant to Federal Rule of Bankruptcy Procedure 9(a) and (b), made applicable herein by Federal Rule of Bankruptcy Procedure 7009, and Federal Rule of Civil Procedure 12(b)(6), made applicable herein by Federal Rule of Bankruptcy Procedure 7012(b), which is presently before this Court. The Committee filed a Motion for Continuance and Response to Bank Group's Motion to Dismiss on November 5, 2003. A hearing was held on the Motion to Dismiss on November 6, 2003.

Background

During the litigious course of this bankruptcy case, the Debtors' ability to use the Bank Group's cash collateral to fund the "reorganization" has been contested by the Bank Group starting with the Debtors' "first day" motion to use cash collateral and continuing virtually throughout the case as each particular interim order authorizing the use of the cash collateral expired. Along with the Debtors and the Bank Group, the Committee, once it was formed, was involved in each of the cash collateral hearings and participated in the negotiations relating to the Debtors' use of the Bank

Group's cash collateral. Over the course of the case, five separate cash collateral orders have been entered.

The early orders fixed certain deadlines for the challenge to the Bank Group's liens and claims. The deadline for the Debtors to bring any objections to the claims of the Bank Group was June 16, 2003. The Committee's deadline for bringing any objections to the claims of the Bank Group was initially July 14, 2003, but was extended until July 28, 2003, with the agreement of the parties, including the Bank Group, the Debtors, and the Committee, and by the terms of the Fourth Interim Order Authorizing Debtors to Use Cash Collateral, Granting Adequate Protection Liens and Regarding Automatic Stay ("Fourth Interim Cash Collateral Order"), entered on July 15, 2003. The Fourth Interim Cash Collateral Order contained a provision stating:

> Subject to the provisions of the First[,] Second and Third Interim Orders and this Fourth Interim Order, the entry of this Fourth Interim Order shall not prejudice the Committee's right to:
>
> (A) Assert any and all claims and causes of action that the estates or Committee may have, known or unknown, against the Bank Group.

(Fourth Interim Cash Collateral Order, ¶ 31).[1] Both the Third Interim Cash Collateral Order and the Fourth Interim Cash Collateral Order provided that if any party failed to bring an objection to the Bank Group's claims within the time allowed in the orders, "such party shall thereafter be forever barred from asserting or contesting any of the matters [relating to the Bank Group's claims]." (Third Interim Cash Collateral Order, ¶ 24; Fourth Interim Cash Collateral Order, ¶ 24.) The Debtors did not file any objections to the Bank Group's claims by their June 16, 2003 deadline. The Committee filed its Objection to Claims of the Bank Group ("Committee Objection") on July 28, 2003, in which

[1] The Third Interim Cash Collateral Order, entered July 8, 2003, contained substantially the same language. (*See*, Third Interim Cash Collateral Order, ¶ 29.)

it

(1) objected to the "validity, perfection, priority and enforceability of the liens and security interests asserted by the Bank Group arising under the Prepetition Indebtedness" (Committee Objection, ¶ 7);

(2) asserted that "the Bank Group's prepetition actions resulted in their receiving transfers avoidable under Title 11 of the United States Code" (Committee Objection, ¶ 8);

(3) asserted that "the Bank Group's prepetition actions resulted in their receiving transfers avoidable under applicable federal and state law" (Committee Objection, ¶ 9);

(4) asserted that "the Bank Group's prepetition actions give the Estate causes of action under applicable federal and state law against the Bank Group" (Committee Objection, ¶ 10); and, lastly,

(5) asserted that the Bank Group's claims "should be disallowed or equitably subordinated to the claims of other unsecured creditors under the provisions of 11 U.S.C. § 510." (Committee Objection, ¶ 11.)

On September 4, 2003, the Bank Group filed its Response and Motion for Summary Judgment regarding the Objection to the Claims of the Bank Group, in which it sought a summary judgment on the Committee's "objections" to the Bank Group's claims on several grounds, including that the "objections" were not brought by an adversary proceeding, as required by Rule 7001 of the Federal Rules of Bankruptcy Procedure. Subsequently, on September 17, 2003, the Bank Group and the Plaintiffs entered into a Stipulation and Agreed Order Approving Stipulation Regarding (A) Motion by Bank Group to Enforce Adequate Protection Remedies Upon Sales of Assets, (B) Objection of Bank Group to Expedited Motion of Debtors to Extend Exclusive Periods During

Which Debtors May File and Solicit Acceptances of a Plan of Reorganization and Report Pursuant to Local Bankruptcy Rule 3016.1 and (C) Bank Group's Response and Motion for Summary Judgment Regarding the Objection to the Claims of the Bank Group ("Stipulation and Agreed Order"), which was approved by this Court and entered on September 22, 2003. In the Stipulation and Agreed Order, the parties agreed that the Committee would withdraw, with prejudice, its objections contained in ¶ 7 of the Committee Objection, regarding the validity, perfection, priority and enforceability of the Bank Group's liens. The parties also agreed that "[t]he Committee shall, no later than September 30, 2003, amend its Objection to the Claims of the Bank Group by pleading with specificity the facts and circumstances underlying the claims asserted in Paragraphs 8, 9, 10 and 11 of the Committee's Objection to the Claims of the Bank Group," and, further, that "[t]he Committee shall not add any new causes of action or claims with respect to its Objection to the Claims of the Bank Group."

On September 19, 2003, the Committee filed a Motion for Leave of Court to File a Complaint for Equitable Subordination in the Name of the Debtor. In its order signed on September 29, 2003 (the "September 29 Order"), the Court denied the Motion, in that the Committee would not be allowed to file a complaint "in the name of the Debtors." The denial was "without prejudice to the right of the Creditors' Committee to restyle its objection and to file its objection, as necessary, and prosecute it as an adversary proceeding, as limited by the pending claims objection and the Stipulation and Agreement." (*See*, September 29 Order.) On September 30, 2003, the Committee filed its Complaint in this adversary proceeding.

Dismissal Standards

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted."

Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000)(quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). This Court may not dismiss a claim under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In making this determination, the Court must take all facts pleaded in the complaint as true and must liberally construe the complaint in favor of the plaintiff. *Id.* (citing *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986)). A plaintiff has an obligation, however, to plead specific facts, not mere conclusory allegations. *Id.* (citation omitted). To the extent that the plaintiff's claims set forth conclusory allegations or unwarranted deductions of fact, the court is not obliged to accept such allegations or deductions as true. *Id.* (citation omitted).

In its Motion for Continuance and Response to Bank Group's Motion to Dismiss, the Committee argues that the "Bank Group's Motion is not a proper motion under Rule 12(b)(6) but is rather a *sub rosa* attempt to obtain summary judgment under Rule 56, without first providing the Committee the opportunity to conduct the discovery needed to defend the Motion." (Committee Response, ¶ 1b. at 3). The Committee points out that the Motion to Dismiss references numerous "evidentiary items" outside of the Complaint itself, and that reference to these items converts the Motion to Dismiss to a motion for summary judgment.

In ruling on a motion under Rule 12(b)(6), a court may consider the pleadings, any judicially-noticed facts, and any document that has been attached to the pleadings *or* referred to in the pleadings. *See, Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002)(quoting *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir.

1990)(per curium); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 n.4 (5th Cir. 1998)); *see also, Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996)("Normally, in deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint. However, courts may also consider matters of which they may take judicial notice.") (citing Fed. R. Evid. 201(f)). This Court may take notice of pleadings or orders filed in the record in this case. *See generally, Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 481 n.1 (5th Cir. 2003).

Here, seven of the eight items raised by the Committee as being outside of the pleadings are orders or pleadings that are part of the record in this case, of which this Court can take judicial notice. The last item is the Credit Agreement between the Debtors and the Bank Group which was expressly referred to in the Committee's Complaint. By referring to the Credit Agreement and relying on the Credit Agreement in stating at least some of its claims, the Committee has incorporated the Credit Agreement into the Complaint, and, therefore, it may be properly considered under a Rule 12(b)(6) motion.

The Bank Group's Motion to Dismiss

The Motion to Dismiss begins with several general arguments that the Committee is barred from bringing some or all of the claims asserted in the Complaint: that the claims were not timely brought as an adversary proceeding, that the claims on behalf of the estates are barred by this Court's prior orders, that the Committee has no authority to assert claims on behalf of the estates, and that the Committee has waived the right to assert all causes of action other than the preference action and the equitable subordination action. The Bank Group argues specifically, as to each cause of action, that the Committee has failed to state a claim upon which relief can be granted, or that the

Committee has failed to plead facts with sufficient specificity.

A. Were Claims Timely Brought As Adversary Proceeding?

The Bank Group reurges its argument, made in connection with the Committee's Motion for Leave of Court to File a Complaint for Equitable Subordination in the Name of the Debtor, that the Committee's Complaint is untimely because it was not filed on or before July 28, 2003, the deadline set forth in this Court's orders for the Committee to file objections to the Bank Group's claims. The Court, again, rejects this argument as being without merit. The Bank Group is correct that the Committee had until July 28, 2003, to file objections to the Bank Groups's claims and that this adversary proceeding was not filed until after that deadline. However, the Bank Group's conclusion that the filing of the adversary proceeding after the deadline is fatal to the Committee's claims is not only contrary to this Court's prior ruling, which the Bank Group recognized in its brief, but completely ignores the facts and procedural history of this bankruptcy case.

As the Court ruled in its September 29 Order, when the Committee timely filed its objections to the Bank Group's claims that included relief of the kind specified in Rule 7001, it "bec[ame] an adversary proceeding." However, to ensure that the Bank Group received the protections it was entitled to under Rule 7001, *et seq.*, the Court required the Committee to file an adversary proceeding. The Bank Group argues that the District Court for the Northern District of Texas has ruled that if an objection to claim is combined with a demand for relief of the kind specified in Rule 7001 and it is not brought as an adversary proceeding, then the bankruptcy court is "without authority to grant affirmative relief." *See*, Motion to Dismiss at 34 (quoting *In re Lawler*, 106 B.R. 943, 955-57 (N.D. Tex. 1989)). However, there is nothing in *Lawler* that says that the failure to bring an adversary proceeding in these circumstances is jurisdictional. In fact, the issue here is

whether the adversary proceeding was timely filed – clearly a procedural issue that can be waived by the parties. In fact, several courts have held that the failure to bring an adversary proceeding, if required, is not jurisdictional, but may be waived. *See, In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990); *In re Kmart Corp.*, 290 B.R. 601, 604 (Bankr. N.D. Ill. 2002); *In re Felker*, 181 B.R. 1017, 1020 (Bankr. M.D. Ga. 1995). Here, the filing of the adversary proceeding, *per se*, did not prejudice the Bank Group as the Bank Group was fully aware that the Committee was seeking, through its objections, to avoid the Bank Group's liens, and the Court had not addressed any substantive issues regarding the Committee's objections prior to the Committee filing its adversary proceeding.

Alternatively, the requirements of the Third and Fourth Interim Cash Collateral Orders have been met. Those orders expressly provided that the Committee must file its objections by a date certain or it would be forever barred. The Committee filed its objections by the deadline as extended. Therefore, it is not, for that reason, precluded from "contesting" the claims of the Bank Group. In addition, the Bank Group waived its right to complain of the lack of an adversary complaint when it stipulated and agreed, *after* it had raised the issue of the lack of an adversary complaint in its Motion for Summary Judgment on the Committee's Objections to the Bank Group's Claims, that the Committee would have until September 30, 2003, to "amend its Objection to the Claims of the Bank Group by pleading with specificity the facts and circumstances underlying the claims asserted in Paragraphs 8, 9, 10 and 11 of the Committee's Objection to the Claims of the Bank Group." (Stipulation and Agreed Order, ¶ 3 at 3.) The Committee filed this adversary proceeding on September 30, 2003. Therefore, the Court again rejects the Bank Group's argument that the failure of the Committee to bring its objections to the Bank Group's claims in the first instance in the form of an adversary proceeding on or before the July 28, 2003 deadline set forth in

the cash collateral orders is fatal to the claims asserted in this adversary proceeding. As mentioned above, the timely objection gave the Committee the open door to contest the Bank Group's claims.

B. Does the Committee Have Authority to Assert Causes of Action Belonging to the Estates?

The Bank Group argues that all of the claims asserted in this adversary proceeding "in the names of the Debtors" should be dismissed as having been barred by this Court's previous orders. The Bank Group also contends that the Committee does not have authority to bring any of the causes of action that belong to the estates. (Motion to Dismiss at 4.) The Court agrees with the first argument but rejects the second.

The Court agrees that the "Debtors" are barred from objecting to the claims of the Bank Group. As this Court held in its September 29 Order, the Third and Fourth Interim Cash Collateral Orders provided a July 14, 2003 deadline for the Debtors to object to the claims of the Bank Group on behalf of the estates. The Debtors did not object to the Bank Group's claims by July 14, 2003, and they became barred from bringing any claims against the Bank Group on behalf of the estates. Thus, any action "in the name of the Debtors" is barred. The same orders that set the deadline for the Debtors to file objections to the Bank Group's claims also set a different deadline by which the Committee could object to the Bank Group's claims. These orders also provided that, "subject to" the limitations set forth in the cash collateral orders, the Committee could "[a]ssert any and all claims and causes of action that the estates or Committee may have, known or unknown, against the Bank Group." (*See*, Third Interim Cash Collateral Order, ¶ 29; Fourth Interim Cash Collateral Order, ¶ 31). Although the Bank Group argues that the Court misunderstood the terms of the cash collateral orders, and, therefore, was confused when making its ruling, the Court's ruling was based on its finding that the language "subject to" contained in both the Third and Fourth Interim Cash Collateral

Orders did not bar the Committee from bringing claims on behalf of the estates.[2] To the contrary, the Court understood its own order to provide the Committee with the authority to pursue objections on behalf of the estates against the Bank Group, with the "subject to" language only limiting the Committee's rights to the extent that the objections on behalf of itself and the estates must be brought before the July 28, 2003 deadline set for the Committee.

The Court notes that the cash collateral orders specifically gave the Committee a deadline beyond the deadline set for the Debtors to pursue claims on behalf of the estates. Clearly, the cash collateral orders contemplated that, if the Debtors chose not to pursue objections to the Bank Group's claims, the Committee would have the option, *and authority*, to pursue the objections on behalf of the estates. Therefore, the Bank Group's arguments that the Committee does not have authority to pursue causes of action on behalf of the estates because it did not comply with the standard set forth in *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233 (5th Cir. 1988), is rejected. The terms of the cash collateral orders regarding the deadlines for objecting to the Bank Group's claims, and the language in the "reservation of rights for the Committee" paragraph regarding the Committee's right to "[a]ssert any and all claims and causes of action that the estates or Committee may have . . . against the Bank Group" were negotiated terms that were agreed to by the Debtors, the Committee, and the Bank Group, and submitted to the Court for inclusion in the final orders. The Bank Group cannot now be heard to say that the Committee did not have prior court authority to pursue causes of action on behalf of the estates. Thus, while the Committee did

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[2] The initial version of the Court's opinion contained a clerical mistake that occurred because the Court used a copy of the Third Interim Cash Collateral Order provided to the Court during the hearing that same day and represented to the Court as being a correct version of the final order. Apparently, it was not a correct copy of the final order, but a copy of a previous draft that contained the language "notwithstanding the provisions" rather than "subject to the provisions." The Court was notified of this clerical error, and the error was corrected before the order was entered on the docket. Thus, the order actually entered on October 2, 2003, contained the correct language from the cash collateral orders.

not have authority to bring the causes of action "in the name of the Debtors," it did have prior authority from this Court to pursue the causes of action on behalf of the estates. Otherwise, the negotiated language provided little, if any, benefit to the Committee.

C. Did the Committee Waive the Right to Bring Certain Causes of Action?

The Bank Group argues that the Committee waived its right to bring each of the claims asserted in this adversary proceeding, other than the preference claim and the equitable subordination claim, when it entered into the Stipulation and Agreed Order that gave the Committee until September 30, 2003 to amend its objections but also provided that "[t]he Committee shall not add any new causes of action or claims with respect to its Objection to the Claims of the Bank Group." (See, Stipulation and Agreed Order, ¶ 3 at 3.) The Committee does not argue with the proposition that it agreed to waive any claims or causes of action not raised in its original Objection. The Committee argues, however, that the language in its original objection that "the Bank Group's prepetition actions give the Estate causes of action under applicable federal and state law against the Bank Group" (Committee Objection, ¶ 10 at 2-3) subsumes each of the causes of action asserted by it in the adversary proceeding, including fraud, negligent misrepresentation, duress, breach of the duty of good faith, breach of contract, promissory estoppel, and breach of fiduciary duty. When asked by the Court if he could think of any cause of action that would *not* be included in the language "under applicable federal and state law," counsel for the Committee admitted that he could think of none. The Committee argues that "nothing" is exactly what the Bank Group bargained for when it negotiated with the Committee and achieved the Committee's consent that the Committee would not "add any new causes of action or claims with respect to its Objection to the Claims of the Bank Group" when the Committee amended its objection. This has been a hard-fought bankruptcy

proceeding, with much horse trading. Counsel for the Bank Group and the Committee are sophisticated and experienced bankruptcy attorneys. It cannot be the case that the Bank Group would have negotiated a particular term under which the Bank Group would receive "nothing." The Court finds that the Bank Group negotiated for and the Committee consented to a waiver of the right to bring or assert any cause of action against the Bank Group that had not been uniquely identified in its original Objection. The Committee is bound by its agreement in the Stipulation and Agreed Order.

Accordingly, the only causes of action asserted in this adversary proceeding that were also identified in the original Objection are the preference action and the claim for equitable subordination. All other causes of action must be dismissed, with prejudice.

D. Has the Committee Plead the Requisite Elements to Withstand A Motion to Dismiss on its Remaining Claims?

As to the remaining claims, the Bank Group asserts that the Committee has failed to allege facts that would be legally sufficient to support the claims.

1. Preference Action Pursuant to 11 U.S.C. § 547

The Committee seeks to avoid all transfers made from the Debtors to the Bank Group during the ninety days preceding the filing of the bankruptcy petition. To succeed on its preference claim under § 547(b) of the Bankruptcy Code, the Committee must allege facts that, if true, would prove the following elements:

(1) a transfer of an interest of the debtor in property,

(2) to or for the benefit of a creditor,

(3) for or on account of an antecedent debt owed by the debtor before such transfer was made,

(4) made within 90 days before the filing of the petition,

(5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title, (B) the transfer had not been made, and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(*See* 11 U.S.C. § 547(b)). The Bank Group argues that this cause of action must be dismissed because the Committee can prove no set of facts to meet the requirement of the last element. The Committee alleges, in its Complaint, that "[i]f the Debtors' Chapter 11 cases were cases under Chapter 7, the Debtors would not have been able to satisfy fully its indebtedness to creditors, including the Bank Group." (Complaint, ¶ 65 at 12.) The Bank Group argues that "[s]ince the Lenders are fully-secured creditors, the payments are not considered preferential because the Lenders did not receive more than in a Chapter 7 liquidation." (Motion to Dismiss at 12.) However, the Committee has alleged a fact, which, if true, would meet the requirements set forth in § 547(b)(5). Because this Court is bound to accept the Committee's allegations as true for purposes of this motion, and because motions to dismiss are disfavored, this Court finds that the Committee has met at least the minimum pleading requirements to withstand a motion to dismiss as to this claim.

The Bank Group also seems to read the Committee's Complaint as requesting an avoidance of the Bank Group's liens as a preferential transfer based on the following language in the Complaint:

> Plaintiffs have requested the transfer of the Bank Group's liens to the Debtors' estates. Should this Court order the lien transfer, all prepetition payments received by the Bank Group within ninety days of filing will be preferential, making these transfers preferential and subject to avoidance.

(Complaint, ¶ 66 at 12.) The Bank Group apparently perceives this statement to be a claim by the Committee seeking to avoid the Bank Group's liens as preferences under § 547(b) because the Bank

Group raised this issue in its Motion to Dismiss and then argues that the claim should be dismissed because the liens were "transferred" to the Bank Group prior to the ninety day window preceding the bankruptcy. The Court reads this paragraph to be an argument that the Committee is pursuing that if the Court transfers the Bank Group's liens back to the bankruptcy estate as requested by the Committee pursuant to its claims under § 510(c) of the Bankruptcy Code for equitable subordination, then the Bank Group will be deemed to not have had a lien during the ninety days prior to the bankruptcy filing, and, therefore, all transfers made during that time period would become preferential. To the extent that the Bank Group's interpretation is the correct one, the Court agrees with the Bank Group that the Committee has not, and cannot, allege facts to support a claim that the transfers of the liens themselves to the Bank Group from the Debtors prior to bankruptcy occurred within the ninety day preference window. Because the Court has refused the Bank Group's motion to dismiss the preference action as to the prepetition transfer of funds from the Debtors to the Bank Group, the Court need not opine regarding the Committee's alternative grounds for relief, to the extent that the Court's interpretation of the Committee's allegations is correct.

Lastly, the Bank Group urges that the Committee waived any right to attempt to avoid the Bank Group's liens because the Committee agreed to withdraw, with prejudice (Stipulation and Agreed Order, ¶ 2 at 2), its objections to the "validity, perfection, priority and enforceability of the liens and security interests asserted by the Bank Group arising under the Prepetition Indebtedness." (Committee Objection, ¶ 7 at 2.) The Court recalls that counsel for the Committee made it clear, when announcing the agreement reached by the parties, that it was only dismissing its claims against the Bank Group regarding perfection issues related to the Bank Group's liens. It was not dismissing claims for equitable subordination or claims seeking to avoid the Bank Group's liens as fraudulent

or preferential transfers.

2. Equitable Subordination

The Committee seeks to equitably subordinate the claims and liens of the Bank Group pursuant to § 510(c) of the Bankruptcy Code, which provides,

> Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may –
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part or an allowed interest to all or part of another allowed interest; or
> (2) order than any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C. § 510(c). The Bank Group points out that the Fifth Circuit has essentially limited claims for equitable subordination to three fact situations:

> (1) when a fiduciary of the debtor misuses his position to the disadvantage of other creditors;
> (2) when a third party controls the debtor to the disadvantage of other creditors; and
> (3) when a third party actually defrauds other creditors.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.), 119 F.3d 349 (5th Cir. 1997). The Bank Group argues that the Committee has not alleged facts that would bring the Bank Group's actions within the type set forth by the Fifth Circuit that would subject the Bank Group's claims or liens to equitable subordination. The Committee responds by arguing that the "typical cases" cited by the Bank Group from *Cajun Electric* "are exactly the things that the banks did, and that those things amount to the control that the case law proscribes." (Committee Response at 11.) The Bank Group complains that the allegations related to fraud were not plead with sufficient specificity. Although the Committee has alleged some facts, which, if proven, may contribute to a finding of grounds for equitable subordination, the Court agrees that the Committee has not plead its facts with sufficient particularity as required by

Bankruptcy Rule 7009. However, because this Court is admonished to treat motions to dismiss with disfavor, the Court will deny the Bank Group's motion as to the Committee's claims for equitable subordination and will allow the Committee to amend its Complaint to plead its allegations of fraud with particularity.

Conclusion

For the foregoing reasons, the Court will grant the Bank Group's motion to dismiss as to all causes of action asserted in this adversary proceeding by the Committee and/or the Debtors against the Bank Group other than the preference action and the claim for equitable subordination. As to the remaining two claims, the Committee will not be allowed to pursue them "in the name of the Debtors." The Committee will be allowed to pursue the remaining claims in its name and on behalf of the estates. The Committee will be allowed to amend its Complaint to plead facts related to its equitable subordination claim with sufficient particularity as required by Rule 7009(b) of the Federal Rules of Bankruptcy Procedure. Accordingly,

IT IS ORDERED that the causes of action asserted by the Committee and the Debtors against the Bank Group in Count One (fraud), Count Two (negligent misrepresentation), Count Three (duress), Count Four (breach of duty of good faith), Count Five (breach of contract), Count Six (promissory estoppel), and Count Eight (breach of fiduciary duty) be, and hereby are, **dismissed, with prejudice** pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, incorporated herein pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure;

IT IS FURTHER ORDERED that the Motion to Dismiss by the Bank Group with respect to Count Seven (equitable subordination) and Count Nine (preference) be, and hereby is **denied**;

IT IS FURTHER ORDERED that the Committee shall have until Friday, January 9, 2003,

to amend its Complaint to plead facts with specificity regarding its claim for equitable subordination.

It is so ordered.

Signed this 29 day of December, 2003.

Honorable Harlin D. Hale
United States Bankruptcy Judge